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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/701,254	11/04/2003	Pete Maletto	104601-50376	6083

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EXAMINER

MAHAFKEY, KELLY JO

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 12/15/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/701,254	MALETTO, PETE	
	Examiner	Art Unit	
	Kelly Mahafkey	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
 - If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
 - Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-16 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-16 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. ____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. ____. |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date <u>12/18/03</u> . | 6) <input type="checkbox"/> Other: ____. |

DETAILED ACTION

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

3. Claims 1-16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Weinstein (US 0648967) and in view of Ghaffari et al. (US 2004/0091597), and as evidence by Whelan et al. (US 5084295) and in view of Igoe, Robert (Dictionary of Food Ingredients 4th Edition) and in view of Stillman (US 2003/0064104).

4. Regarding claims 1-16, Weinstein discloses of a reduced caloric ice cream with the organoleptic properties of a superior ice creamlike frozen confection (Column 1 lines 31-38 and Column 2 lines 55-60). Weinstein discloses that the composition can vary in fat content, depending on the desired final form (i.e. ice cream, diabetic ice cream, sherbet, and ice mile). Weinstein teaches that the frozen confections have a composition which includes, but is not limited to: as low as 5% heavy cream to as high

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as about 41% heavy cream (36-40% fat), 12.6950-53.205% water, 0.1-2% mixture of locust bean gum and carrageenan gum, 0.20% (about 0.3%) mono- and di- glycerides of short chain fatty acids (TM 100VS), 0-0.01% saccharin, and 0-3.55% flavor (vanilla and cocoa). Refer specifically to Examples 1-7. Weinstein additionally teaches that 0.1-0.5% stabilizer, 0.1-0.2% emulsifier, 0.3-0.5% gums, various sweeteners, including synthetic sweeteners, and egg yolks can be included in the frozen confection (Column 5 lines 19-59).

5. Weinstein, however, is silent to the frozen confection composition as including 1-2% egg yolks, 5-7% polydextrose, 5-9% glycerin, 0.1-0.2 xanthan gum, sucralose to acesulfame potassium in a specific amount and ratio, 0.4-0.7% microcrystalline cellulose gel, 0.7-1.5% maltodextrin soluble fiber, 70-85% whey protein in the 0.6-1% whey protein concentrate, and 0.1-0.2% lecithin as recited in claims 1, 2, 5, and 6.

6. Regarding the addition of 1-2% egg yolk, Weinstein teaches that egg yolks can be included in the frozen confection in order to provide uniform whipping action and yield a product with a smoother body and texture (Column 5 lines 52-55). It would have been obvious to one skilled in the art at the time the invention was made to include any amount of egg yolks, depending the desired effect from the egg yolk (i.e. the amount of smoothness in the body and texture of the final product).

7. Regarding 5-7% polydextrose, Ghaffari et al. (Ghaffari) teaches of a low caloric frozen confection, which contains ingredients for providing the organoleptic properties of a traditional frozen confection (Abstract). Ghaffari teaches that the frozen confection

may include 1-10% polydextrose, functioning as both as a bulking agent and as a fiber source (Paragraph 0035). It would have been obvious to one skilled in the art at the time the invention was made to have included 5-7% polydextrose in view of Ghaffari in the frozen confection as taught by Weinstein. One would have been motivated to do so in order to take advantage of the benefits of 1-10% polydextrose, such as both a bulking agent and as a fiber source in a low caloric frozen confection (Ghaffari Paragraph 0035). Because both deal with low caloric frozen confections, one would have a reasonable expectation of success from the combination.

8. Regarding 5-9% glycerin, Ghaffari teaches of a low caloric frozen confection, which contains ingredients for providing the organoleptic properties of a traditional frozen confection (Abstract). Ghaffari teaches that the frozen confection may include 1-5% glycerol in order to control ice formation (Paragraph 0037). It would have been obvious to one skilled in the art at the time the invention was made to have included 1-5% (about 7%) glycerol in view of Ghaffari in the frozen confection as taught by Weinstein. One would have been motivated to do so in order to take advantage of the benefits of glycerol, such its ability to control ice formation (Ghaffari Paragraph 0037). Because both deal with low caloric frozen confections, one would have a reasonable expectation of success from the combination.

9. Regarding 0.1-0.2 xanthan gum, Ghaffari teaches of a low caloric frozen confection, which contains ingredients for providing the organoleptic properties of a traditional frozen confection (Abstract). Ghaffari teaches that because of the different functionalities of gums, combinations of certain gums will provide for better products

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than single gums, including xanthan, locust bean and carrageen gums (Paragraph 0027). It would have been obvious to one skilled in the art at the time the invention was made to have included any combination of gums, depending on the desired properties of the final product (Ghaffari Paragraph 0027). Because both deal with low caloric frozen confections, one would have a reasonable expectation of success from the combination.

10. Regarding the amount and specific ratio of sucralose and acesulfame K, Weinstein teaches that artificial sweeteners can be utilized, however, is silent to which sweeteners and in which combinations and amounts. Igoe teaches that sucralose contains no calories, is heat stable, and readily soluble. Igoe teaches that acesulfame K is also heat stable, readily soluble, and has a synergistic effect with other sweeteners. It would have been obvious to one skilled in the art at the time the invention was made to have specifically included sucralose and acesulfame K in view of Igoe in the frozen confection as taught by Weinstein. One would have been motivated to do so in order to take advantage of the benefits of sucralose, such as a sweetener that could be added without the addition of calories, and the benefits of acesulfame K, such as the synergistic sweetening powers with other sweeteners. It would have been further obvious to one skilled in the art at the time the invention was made to have include any amount of sweeteners and ratio of sweeteners depending on the desired sweetness in the final product. Because both deal with food ingredients and low caloric foods, one would have a reasonable expectation of success from the combination.

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11. Regarding 0.4-0.7% microcrystalline cellulose gel, Ghaffari discloses that it is advantageous to add microcrystalline cellulose gels as stabilizers (Paragraph 0028). It would have been obvious to one skilled in the art at the time the invention was made to have included any amount of microcrystalline gel in view of Ghaffari in the frozen confection as disclosed by Weinstein. One would have been motivated to include microcrystalline cellulose gels in order to gain the benefits of a microcrystalline cellulose gel in a frozen confection, such as the ability to act as a stabilizer. It would have been further obvious to one skilled in the art at the time the invention was made to have include any amount of microcrystalline cellulose gel depending on the amount of stabilizing effect from the gel desired. Because both deal with low caloric frozen confections, one would have a reasonable expectation of success from the combination.

12. Regarding the addition of fiber in the frozen confection, it is notoriously well known that fiber is a value-added product because of the associated health benefits. Specifically, regarding the addition of maltodextrin soluble fiber as one of the primary fiber sources in the frozen confection, Stillman discloses that maltodextrin soluble fiber assists in regulating large bowel movements and improving constipation in the body (Paragraph 0965). It would have been obvious to one skilled in the art at the time the invention was made to have included maltodextrin soluble fiber as one of the primary fiber sources to gain the benefits of maltodextrin soluble fiber, such as, the ability to regulate bowels and improve constipation.

13. Regarding 70-85% whey protein in the 0.6-1% whey protein concentrate or the ice cream composition as containing 0.42-0.85% whey protein, Iggo teaches that whey

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protein provides water and viscosity control. It would have been obvious to one skilled in the art at the time the invention was made to have included whey protein in any conventional form (i.e. whey protein concentrate depending on if additional sugar is desired or undesired) in view of Igoe in the frozen confection as taught by Weinstein. One would have been motivated to do so in order to take advantage of the benefits whey protein, such as the ability to control water and viscosity. Because both deal with ingredients in food products, one would have a reasonable expectation of success from the combination.

14. Regarding 0.1-0.2% lecithin, Igoe discloses that lecithin is typically added in the range of 0.1-1% in order to emulsify and control the flow properties of food products (Page 83). It would have been obvious to one skilled in the art at the time the invention was made to include 0.1-1% lecithin in view of Igoe in the frozen composition as disclosed by Weinstein. One would have been motivated to do so in order to gain the benefits of lecithin, such as, it's emulsifying and flow controlling properties. Because both deal with ingredients in food products, one would have a reasonable expectation of success from the combination.

Conclusion

15. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure:

16. US 5120563 discloses of a reduced calorie food composition.

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17. US 5084295 discloses of a process for making low calorie fat-containing frozen dessert products having a smoother and creamy texture.

18. US 6511694 B2 discloses of a stable soft frozen dessert.

19. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Mahafkey whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

20. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

21. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



12/5/05

Kelly Mahafkey
Examiner
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